



500 Capitol Mall, Suite 1600  
Sacramento, California 95814  
main 916.447.0700  
fax 916.447.4781  
www.stoel.com

June 8, 2011

JOHN A. MCKINSEY  
Direct (916) 319-4746  
jamckinsey@stoel.com

**VIA EMAIL**

The Honorable James D. Boyd  
Hearing Officer Paul Kramer  
California Energy Commission  
1516 Ninth Street  
Sacramento, CA 95814

**Re: Carlsbad Energy Center Project (07-AFC-6)**  
**Applicant's Comments on the Presiding Member's Proposed Decision**

Dear Commissioner Boyd and Hearing Officer Kramer:

Pursuant to the Notice of Availability of the Presiding Member's Proposed Decision ("PMPD") dated May 9, 2011, Applicant Carlsbad Energy Center LLC respectfully submits the following comments on the PMPD for the Carlsbad Energy Center Project ("CECP"). Applicant appreciates the opportunity to provide these comments and looks forward to the presentation of the PMPD to the full Commission on June 15, 2011.

The PMPD presents a sound and responsible decision by the Committee. The decision largely recognizes the parties' differing positions and incorporates a significant number of conditions of certification to ensure compliance with all applicable laws, ordinances, regulations, and standards ("LORS"). Applicant's comments herein are specifically focused on suggested changes to conditions of certification CUL-6 and NOISE-4, and comments on the topics of Hazardous Materials Management, Land Use, and Worker Safety and Fire Protection.

**CULTURAL RESOURCES**

Applicant has reviewed the findings of the Committee for Cultural Resources and concurs with the findings set forth in the PMPD. While most of the conditions of certification (CUL-1 through CUL-8) appear to be standard conditions for this resource topic, Applicant believes one condition includes specific language that may be unwarranted. In particular, Applicant believes the requirement for a Native American monitor to be present at all times "in areas where excavations may extend into native soil" is not warranted. (PMPD, Cultural Resources Section at p. 16.) Applicant believes this particular condition may create unnecessary restrictions during



The Honorable James D. Boyd

Hearing Officer Paul Kramer

June 8, 2011

Page 2

construction. Conditions are in place that would allow the Cultural Resource Specialist, who will have the experience to determine if Native American monitoring is required, and the conjunction with the Compliance Project Manager, will determine when or if Native American monitoring would be required.

To that end, Applicant requests the following changes to condition of certification CUL-6:

**CUL-6: The project owner shall ensure that the CRS, alternate CRS, or CRMs monitor full time all ground disturbance of native soils at the project site, along linear facilities and roads, and at parking and other ancillary areas, including wetlands mitigation areas, to ensure there are no impacts to undiscovered resources and to ensure that known resources are not impacted in an unanticipated manner.**

The project owner shall ensure that the CRS, alternate CRS, or CRMs shall monitor ground disturbance, including tank removal and soil remediation, full time at the project site and linear facilities, and ground disturbance full time at laydown areas or other ancillary areas, to ensure there are no impacts to undiscovered resources and to ensure that known resources are not impacted in an unanticipated manner (discovery). Specifically, the CRS, alternate CRS, or CRMs shall monitor the ground disturbance, including tank removal and soil remediation, that reaches to within 3 feet of native soil below the fill and all ground disturbance, including tank removal and soil remediation, in native soil. Whether or not archaeological monitoring is being conducted at project locations, twice daily, in the morning and afternoon, an archaeological monitor shall examine locations where machinery is disturbing fill soil to determine whether native soils might be disturbed. If disturbance is within 3 feet of native soil, full-time monitoring shall commence.

Full-time archaeological monitoring for this project shall be the archaeological monitoring of all earth-moving activities on the project site and laydown areas, including tank removal and soil remediation, for as long as the activities are ongoing. Full-time archaeological monitoring shall require at least one monitor per excavation area where machines **are actively disturbing** may disturb native soils. If an excavation area **or areas are** is too large for one monitor to effectively observe the soil removal, one or more additional monitors shall be retained to observe the area.



The Honorable James D. Boyd

Hearing Officer Paul Kramer

June 8, 2011

Page 3

**In the event that the CRS believes that the current level of monitoring is not appropriate in certain locations, a letter or e-mail detailing the justification for changing the level of monitoring shall be provided to the CPM for review and approval prior to any change in the level of monitoring.**

If future geotechnical core borings are conducted for the project, they shall be monitored and the boring cores examined by a geoarchaeologist or qualified archaeologist for the presence of cultural material. If cultural material is identified, that information shall be reported to the CPM within 24 hours. Whether or not cultural material is identified, the results of the core examinations shall be provided in a report to the CPM.

In the event that the CRS determines that the current level of monitoring is not appropriate in certain locations, a letter or e-mail detailing the justification for changing the level of monitoring shall be provided to the CPM for review and approval prior to any change in the level of monitoring.

The research design in the CRMMP shall govern the collection, treatment, retention/disposal, and curation of any archaeological materials encountered.

On forms provided by the CPM, CRMs shall keep a daily log of any monitoring and other cultural resources activities and any instances of non-compliance with the Conditions and/or applicable LORS. From these logs, the CRS shall compile a monthly monitoring summary report to be included in the Monthly Compliance Report (MCR). If there are no monitoring activities, the summary report shall specify why monitoring has been suspended.

The CRS, at his or her discretion, or at the request of the CPM, may informally discuss cultural resources monitoring and mitigation activities with Energy Commission technical staff.

Cultural resources monitoring activities are the responsibility of the CRS. Any interference with monitoring activities, removal of a monitor from duties assigned by the CRS, or direction to a monitor to relocate monitoring activities by anyone other than the CRS shall be considered non-compliance with these Conditions.



The Honorable James D. Boyd

Hearing Officer Paul Kramer

June 8, 2011

Page 4

Upon becoming aware of any incidents of non-compliance with the Conditions and/or applicable LORS, the CRS and/or the project owner shall notify the CPM by telephone or e-mail within 24 hours. The CRS shall also recommend corrective action to resolve the problem or achieve compliance with the Conditions. When the issue is resolved, the CRS shall write a report describing the issue, the resolution of the issue, and the effectiveness of the resolution measures. This report shall be provided in the next MCR for the review of the CPM.

**The project owner shall obtain a Native American monitor to monitor ground disturbance in any areas where Native American artifacts are discovered in native soils.** ~~A Native American monitor shall be obtained to monitor ground disturbance, including tank removal and soil remediation, in areas where excavations may extend into native soil.~~ Informational lists of concerned Native Americans and guidelines for monitoring shall be obtained from the Native American Heritage Commission. Preference in selecting a monitor shall be given to Native Americans with traditional ties to the area that shall be monitored. If efforts to obtain the services of a qualified Native American monitor are unsuccessful, the project owner shall immediately inform the CPM. The CPM will either identify potential monitors or will allow ground disturbance, including tank removal and soil remediation to proceed without a Native American monitor.

**Verification:**

1. At least 30 days prior to the start of ground disturbance, including tank removal and soil remediation, the CPM will provide to the CRS an electronic copy of a form to be used as a daily monitoring log. While monitoring is ongoing, the project owner shall include in each MCR a copy of the monthly summary report of cultural resources related monitoring prepared by the CRS.
2. Daily, the CRS shall provide a statement that "no cultural resources more than 50 years of age were discovered" to the CPM as an e-mail, or in some other form acceptable to the CPM. The statement shall also include information based on the twice daily observations of soils by the archaeological monitor and indicate the likelihood of disturbing native soils. If the CRS concludes that daily reporting is no longer necessary, a letter or e-mail providing a detailed justification for the decision to reduce or end daily reporting shall be provided to the CPM for review and approval at least 24 hours prior to reducing or ending daily reporting. At least



The Honorable James D. Boyd  
Hearing Officer Paul Kramer

**June 8, 2011**

Page 5

24 hours prior to implementing a proposed change in monitoring level, documentation justifying the change shall be submitted to the CPM for review and approval.

3. At least 24 hours prior to implementing a proposed change in monitoring level, documentation justifying the change shall be submitted to the CPM for review and approval.

4. If geotechnical core borings are conducted and cultural material is identified by a geoarchaeologist or archaeologist, the CPM shall be notified within 24 hours. Within 30 days after the examination of the core borings is completed, the CRS shall provide a copy of the results of the core examinations in a report to the CPM.

(PMPD, Cultural Resources Section at pp. 15-17; see also, Applicant's Exhibit 117.)

#### **NOISE**

Applicant has demonstrated that CECP can meet noise limits that are more stringent than applicable LORS. As such, it appears the Commission has set 51 dBA as the enforcement threshold for meeting condition of certification NOISE-4. Applicant respectfully requests the Commission modify NOISE-4 to be consistent with the applicable City of Carlsbad noise threshold and ordinance standard of 53 dBA. Notwithstanding the foregoing, Applicant is amenable to the inclusion in NOISE-4 of M2 as an additional noise monitoring location. To that end, Applicant proposes NOISE-4 is revised as follows:

**NOISE-4** The project design and implementation shall include appropriate noise mitigation measures adequate to ensure that operation of the project will not cause noise levels due solely to plant operation to exceed an average of ~~53~~ 53 dBA Leq measured at monitoring locations M2 or M7. No new pure-tone components shall be caused by the project. No single piece of equipment shall be allowed to stand out as a source of noise that draws legitimate complaints.

#### **HAZARDOUS MATERIALS MANAGEMENT**

After issuance of the PMPD, Staff offered additional evidence related to Hazardous Materials Management. Specifically, Dr. Alvin Greenberg presented a new condition of certification,



The Honorable James D. Boyd

Hearing Officer Paul Kramer

**June 8, 2011**

Page 6

HAZ-10. This new condition serves as a measure to address concerns raised by several intervenors related to the cleaning of the gas pipeline. In particular, various intervenors were concerned about the specific activity of “flammable gas blows” – the purported cause of the Kleen Energy explosion in February 2010. Applicant understands the intervenors’ concerns related to this issue and is amenable to Dr. Greenberg’s proposed new condition, HAZ-10.

#### **LAND USE**

During the May 19-20 hearing, Applicant proposed a condition of certification related to the permanent shutdown of Units 4 and 5. Subsequent to the hearing, however, Applicant met with officials from the City of Carlsbad and the Carlsbad Redevelopment Agency to discuss this condition and other concessions. To that end, on June 3, 2011, Applicant docketed two proposed conditions of certification (LAND-2 and LAND-3), which it believes the City will support.

In addition to the above, the PMPD requested that the parties comment regarding compliance with Carlsbad Municipal Code section 21.36.070 regarding lot coverage proposed by CECP. (See PMPD, Land Use Section at p. 20.) As explained below, this is clearly not a compliance issue for this project.

Section 21.36.070 provides “[a]ll buildings and structures, including accessory buildings and structures, shall cover no more than fifty percent of the area of the lot.”

In turn, building is defined as “any structure having a roof, including all forms of inhabitable vehicles even though immobilized. Where this title requires, or where special authority granted pursuant to this title requires that a use shall be entirely enclosed within a building, this definition shall be qualified by adding ‘and enclosed on all sides.’” (Muni. Code § 21.04.060.)

CECP is not a “building” within the meaning of the Municipal Code, because the CECP facility is comprised solely of non-habitable equipment and has no roof. Section 21.36.070 applies to both buildings and structures, but “structure” is not defined in the Municipal Code. As the CECP is comprised entirely of equipment that cannot be inhabited, or even entered, it may not even qualify as a structure within the meaning of section 21.36.070.

Assuming, however, that this municipal code provision on lot coverage is applicable to CECP, the project would comply with the requirements anyway. CECP is located on a 30-acre parcel (APN 210-01-041) east of the railroad tracks, which can be considered the relevant “lot” on which CECP is located for purposes of section 21.36.070. (Application for Certification



The Honorable James D. Boyd  
Hearing Officer Paul Kramer

**June 8, 2011**

Page 7

(“AFC”), p. 5.6-16.) The CECP site itself is approximately 23 acres. (*Id.*) The footprint of the two proposed CECP units is approximately 7 acres. This footprint includes the equipment shown in revised Figure 2.2-1 of the Project Enhancements and Refinements (“PEAR”) submittal, including the combustion turbine generators; heat recovery steam generators; steam turbine generators; accessory equipment for the generators; water tanks, including the fire water tank, raw water tank, demineralized water tank; and ammonia storage. (AFC, p. 2-5 – 2-11; PEAR, p. 2-2 (“the project enhancements and refinements do not change the overall design and operations of the CECP power block from that described in the AFC”), revised Figure 2.2-1.) The only other structure that will be located on the 30-acre parcel is Fuel Oil Tank 4, which will not be removed as part of the project. The acreage of this tank is approximately 0.7 acres. Thus, combined, Tank 4 and CECP equipment will cover less than 8 acres of the 30-acre parcel, or less than 27%. Considering the lot coverage of the 23-acre CECP project site, CECP will cover approximately 7 acres of the 23-acre area, or approximately 30% of the 23 acres. Under either scenario, CECP is therefore safely consistent with the requirements of Municipal Code section 21.36.070.

#### **WORKER SAFETY**

Applicant noted a typographical error in the PMPD discussion for Worker Safety and Fire protection. On the bottom of page 4 in this section, the text, in pertinent part, reads:

“Both ramps and the road around the power plant at the bottom of the “bowl” will be at least 30 feet wide at all places.”

(PMPD, Worker Safety Section at p. 4.)

The correct width for the road around the bottom of the “bowl” is 28 feet, as set forth at the February 2010 evidentiary hearing and in condition of certification WORKER SAFETY-6. Applicant respectfully requests the Committee revise the language to read as follows:

“Both ramps and the road around the power plant at the bottom of the “bowl” will be at least ~~30~~ 28 feet wide at all places.”

In addition, Staff proposed an additional condition of certification in its May 17, 2011 supplemental testimony to address concerns related to potential transformer fires (WORKER SAFETY-10). Applicant agrees to the inclusion of this condition in the Final Decision. Furthermore, during the PMPD Hearing, Staff presented a new condition, WORKER SAFETY-



The Honorable James D. Boyd  
Hearing Officer Paul Kramer

**June 8, 2011**


Page 8

11, in an effort to eradicate concerns about the source of water for fire protection. Applicant agreed to WORKER SAFETY-11 (Staff's new Exhibit 228) on the record. (See also PMPD Hearing Transcript at pp. 52-53 (May 20, 2011).)

**CONCLUSION**

The foregoing represents Applicant's comments on the PMPD. Applicant appreciates the Staff's and the Committee's diligence to publish the PMPD and looks forward to participating in the full Commission's hearing on the PMPD, and possible approval of CECP, on June 15, 2011.

Respectfully submitted,

  
for John A. McKinsey

JAM:kjh

cc: See Proof of Service List



THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA  
1516 NINTH STREET, SACRAMENTO, CA 95814  
1-800-822-6228 – [WWW.ENERGY.CA.GOV](http://WWW.ENERGY.CA.GOV)

APPLICATION FOR CERTIFICATION  
FOR THE CARLSBAD ENERGY  
CENTER PROJECT

Docket No. 07-AFC-6  
PROOF OF SERVICE  
(Revised 5/18/2011)

Carlsbad Energy Center LLC  
Applicant's Comments on the Presiding Member's Proposed Decision

CALIFORNIA ENERGY COMMISSION  
Attn: Docket No. 07-AFC-6  
1516 Ninth Street, MS-4  
Sacramento, CA 95814-5512  
[docket@energy.state.ca.us](mailto:docket@energy.state.ca.us)

**APPLICANT**

Jennifer Hein  
George Piantka, P.E.  
NRG Energy, West  
5790 Fleet Street, Suite 200  
Carlsbad, CA 92008  
[jennifer.hein@nrgenergy.com](mailto:jennifer.hein@nrgenergy.com)  
[george.piantka@nrgenergy.com](mailto:george.piantka@nrgenergy.com)

**APPLICANT'S CONSULTANTS**

Robert Mason, Project Manager  
CH2M Hill, Inc.  
6 Hutton Centre Drive, Ste. 700  
Santa Ana, CA 92707  
[Robert.Mason@ch2m.com](mailto:Robert.Mason@ch2m.com)

Megan Sebra  
CH2M Hill, Inc.  
2485 Natomas Park Drive, Ste. 600  
Sacramento, CA 95833  
[Megan.Sebra@ch2m.com](mailto:Megan.Sebra@ch2m.com)

**COUNSEL FOR APPLICANT**

John A. McKinsey  
Stoel Rives LLP  
500 Capitol Mall, Ste. 1600  
Sacramento, CA 95814  
[jamckinsey@stoel.com](mailto:jamckinsey@stoel.com)

**INTERESTED AGENCIES**

California ISO  
(e-mail preferred) [e-recipient@caiso.com](mailto:e-recipient@caiso.com)

**INTERVENORS**

Terramar Association  
Kerry Siekmann & Catherine Miller  
5239 El Arbol  
Carlsbad, CA 92008  
[siekmann1@att.net](mailto:siekmann1@att.net)

City of Carlsbad  
South Carlsbad Coastal Redevelopment Agency  
Allan J. Thompson  
Attorney for City  
21 "C" Orinda Way #314  
Orinda, CA 94563  
[allanori@comcast.net](mailto:allanori@comcast.net)

City of Carlsbad  
South Carlsbad Coastal Redevelopment Agency  
Joseph Garuba, Municipals Project Manager  
Ronald R. Ball, Esq., City Attorney  
1200 Carlsbad Village Drive  
Carlsbad, CA 92008 (e-mail preferred)  
[Joe.Garuba@carlsbadca.gov](mailto:Joe.Garuba@carlsbadca.gov);  
[ron.ball@carlsbad.ca.gov](mailto:ron.ball@carlsbad.ca.gov)

California Unions for Reliable Energy ("CURE")  
Gloria D. Smith & Marc D. Joseph  
Adams Broadwell Joseph & Cardozo  
601 Gateway Boulevard, Suite 1000  
South San Francisco, CA 94080  
[gsmith@adamsbroadwell.com](mailto:gsmith@adamsbroadwell.com)  
[mdjoseph@adamsbroadwell.com](mailto:mdjoseph@adamsbroadwell.com)

Center for Biological Diversity  
c/o William B. Rostove  
EARTHJUSTICE  
426 17th St., 5th Floor  
Oakland, CA 94612  
[wrostov@earthjustice.org](mailto:wrostov@earthjustice.org)

Power of Vision  
Julie Baker and Arnold Roe, Ph.D.  
4213 Sunnyhill Drive  
Carlsbad, CA 92013  
[powerofvision@roadrunner.com](mailto:powerofvision@roadrunner.com)

Rob Simpson  
Environmental Consultant  
27126 Grandview Avenue  
Hayward, CA 94542  
[rob@redwoodrob.com](mailto:rob@redwoodrob.com)

**ENERGY COMMISSION**

JAMES D. BOYD  
Vice Chair and Presiding Member  
[jboyd@energy.state.ca.us](mailto:jboyd@energy.state.ca.us)

Tim Olson  
Adviser to Vice Chair Boyd  
[tolson@energy.state.ca.us](mailto:tolson@energy.state.ca.us)

Paul Kramer  
Hearing Office  
[pkramer@energy.state.ca.us](mailto:pkramer@energy.state.ca.us)

Mike Monasmi  
Siting Project Manager  
[mmonasmi@energy.state.ca.us](mailto:mmonasmi@energy.state.ca.us)

Dick Ratliff  
Staff Counsel  
[dratliff@energy.state.ca.us](mailto:dratliff@energy.state.ca.us)

Jennifer Jennings  
Public Adviser's Office  
[publicadviser@energy.state.ca.us](mailto:publicadviser@energy.state.ca.us)

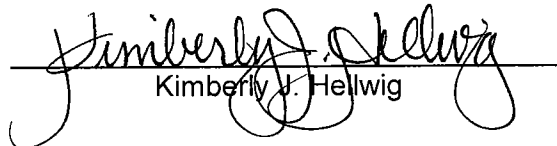
**DECLARATION OF SERVICE**

I, Kimberly J. Hellwig, declare that on June 8, 2011, I deposited copies of the aforementioned document in the United States mail at 500 Capitol Mall, Suite 1600, Sacramento, California 95814, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

**AND/OR**

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, Title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.

  
Kimberly J. Hellwig